(5)

No. 90-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

When the facts upon which a seniority-related grievance is based occur almost one year after the expiration of the collective bargaining agreement recognizing seniority and requiring arbitration, does Section 8(a)(5) of the National Labor Relations Act require the employer to submit to the arbitration of the grievance?

LIST OF PARTIES IN THE COURT BELOW*

The name of the only party to the proceeding in the Court of Appeals for the Ninth Circuit which is not listed in the caption of the case in this Court is:

Printing Specialties District Counsel
No. 2, as successor to Printing Specialties
District Council No. 1.

* Litton Industries, Inc. is the parent corporation of petitioner.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 NLRB 817. The opinion of the Court of Appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128.

JURISDICTION

The judgment of the Court of Appeals was entered on January 16, 1990. An order of the Court of Appeals denying a petition for rehearing was filed on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990. Pursuant to Rule 13, Rules of the Supreme Court of the United

States, a petition for a writ of certiorari to review a judgment entered by a United States Court of Appeals may be filed with the Clerk of this Court within 90 days from the date of a denial of a petition for rehearing.

The petition for a writ of certiorari was granted by this Court on November 13, 1990, limited to the question set forth on page i of this brief.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. §158(a), provides:

> (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer —
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

2. Section 8(d) of the National Labor Relations Act, 29 U.S.C. §158(d), provides:

> (d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and

> other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the

existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

3. Section 13 of the National Labor Relations Act, 29 U.S.C. §163, provides:

Nothing in this Act . . . except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

4. Section 201 of the National Labor Relations Act, 29 U.S.C. §171, provides:

It is the policy of the United States that —

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and

employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding

> the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

5. Section 203(d) of the National Labor Relations Act, 29 U.S.C. §173(d), provides:

> (d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

6. Section 301(a) of the National Labor Relations Act, 29 U.S.C. §185(a), provides:

> (a) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

1. Background

Petitioner operated a printing plant in Santa Clara, California. Its production employees were represented by the Printing Specialties & Paper Products Union No. 777, Affiliated With District Council No. 1 (the Union). The last contract between petitioner and the union expired *October 5, 1979.* Pet. App. A4, B3.[1] Two printing processes were used: cold-type and hot-type. For economic reasons, petitioner converted solely to hot-type printing, and in late August and early September 1980 laid off ten employees who worked exclusively or primarily in the discontinued cold-type operation. The layoffs were not in order of seniority. The union filed grievances alleging the layoffs were "out of seniority." The expired collective bargaining agreement (CBA) provided that "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal." J.A. 30, Tr. 9, 10. The expired CBA contained articles dealing respectively with grievances and arbitration. J.A. 34-36. Petitioner declined to implement the grievance and arbitration provisions of the expired CBA, instead offering to negotiate with the union over the "effects" of the layoffs. Pet. App. A6, B4-B5.

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[1] The Board and Court below found the contract expired October 5, 1979. It is more likely it expired October 4, 1979. J.A. 53, Tr. 9-10. However, the date of October 5 is used throughout this brief.

2. National Labor Relations Board Proceedings

A Regional Director for the National Labor Relations Board (Board) issued a complaint against petitioner on November 24, 1980, alleging petitioner had engaged in an unfair labor practice "within the meaning of Section 8(a)(1) and (5) . . . of the Act" by refusing to adhere to the grievance and arbitration provisions of the expired CBA. J.A. 15, Tr. 7-8. On September 4, 1981, after a hearing, an Administrative Law Judge (ALJ) issued his decision, finding petitioner had violated Sections 8(a)(1) and (5) of the Act. J.A. 105. The ALJ relied upon the Board's decision in *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408, (1979) and this Court's decisions in *N.L.R.B. v. Benne Katz, etc.*, 369 U.S. 736, and *Nolde Brothers, Inc. v. Local No. 358, etc.*, 430 U.S. 243, distaining the Board's ruling in *The Hilton-Davis Company, etc.*, 185 NLRB 241 (1970). J.A. 117-120.

On May 29, 1987, while the instant case was pending, the Board issued its decision in *Indiana & Michigan Electric Co.*, reaffirming its conclusion in *Hilton-Davis Company* that "the arbitration commitment arises solely from mutual consent and that Congress did not intend the [Act] to operate to create a statutory duty to arbitrate." 284 NLRB 53 at 57 (1987). In *Indiana & Michigan*, the Board took a *Nolde Brothers* approach and applied that case to Section 8(a)(5) of the Act. *Nolde Brothers* was a civil action arising under Section 301(a) of the Act. 29 U.S.C. §185(a). As an exercise of its remedial power, the Board, in *Indiana & Michigan*, stated it would order the arbitration of a post-contract expiration grievance only where the grievance "arise[s] under" the expired agreement. 284 NLRB at 60-61.

In the instant case, the Board, relying on its recent decision in *Indiana & Michigan*, issued its decision on November 6, 1987, finding petitioner had violated Section 8(a)(5) of the Act by engaging in a blanket repudiation of the arbitration provision of the expired CBA. Pet. App. B7-B9. The Board declined to order arbitration, concluding the seniority grievances did not "arise under" the expired CBA because "[t]he right to lay off by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.' " Pet. App. B16.

3. Court of Appeals Opinion

On January 16, 1990, the Court of Appeals for the Ninth Circuit issued its opinion, "assum[ing] without deciding that the Board's *Indiana & Michigan* decision is a reasonably defensible construction of the Section 8(a)(5) duty to bargain," but reversing the Board's decision on the arbitration issue, finding "the Board erred in concluding that the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired CBA . . . ." Pet. App. A18-A22. The Court below specifically declined "the parties' invitation to resolve their dispute over *Indiana & Michigan*" (Pet. App. A18), rejecting petitioner's "contention that it had no obligation to arbitrate any post-expiration grievances because of the passage of time between the expiration of the CBA and the filing of the layoff grievances" as well as the Union's contention that "[r]ather than relying on Section 301 precedent such as *Nolde*, . . . the Board should be analyzing such charges under the 'unilateral change doctrine' of *NLRB v. Katz* . . . ." Pet. App. A18, A26, n. 8, A17.

This Court granted the petition for certiorari on the arbitration issue on November 13, 1990.

SUMMARY OF THE ARGUMENT

I.

The Board and Court below concluded petitioner had violated Section 8(a)(5) of the Act by refusing to arbitrate post-contract expiration grievances. Section 8(a)(5) imposes an obligation on an employer "to bargain collectively with the representatives" of its employees. Section 8(d) defines the obligation to bargain collectively. Part One of Section 8(d) is the "meet and confer" portion of the section. Part Two is the "notice giving" portion of Section 8(d). Petitioner was never charged with refusing to "meet and confer" nor with failing to give the Section 8(d) "notices." Neither the Board nor the Court below found petitioner had failed to "meet and confer" or give Section 8(d) "notices." Instead, the Board the Court below added a Part Three to the Congressional definition of collective bargaining and legislated that collective bargaining also requires an employer to arbitrate post-contract expiration grievances. This they did by applying to the instant case the holding of *Nolde Brothers, Inc. v. Local No. 358, etc.*, 430 U.S. 243. However, *Nolde Brothers, Inc.* was a civil action for breach of contract specifically authorized by Congress when it adopted Section 301(a) of the Act and is inappropriately applied in the instant case, an unfair labor practice proceeding. While it may be appropriate to bring a civil action for breach of contract against a party to a collective bargaining agreement who refuses to arbitrate, Congress clearly did not provide that such a refusal was an unfair labor practice.

II.

In any event, *Nolde Brothers, Inc.* should be modified, as suggested later in this brief, or, at least, narrowly confined to the facts in that case. *Nolde Brothers, Inc.* is inconsistent with various statutory pronouncements of Congress. It is contrary to the long-standing legal principle that arbitration is based upon mutual consent. It is out of sync with the realities of the collective bargaining process. It is difficult to apply, spawning disputes and litigation. It just does not work, depriving both unions and employers of the legal certainty necessary to conduct labor-management relations. Its foundation is suspect.

If *Nolde Brothers, Inc.* is to survive in its present form, it should be narrowly confined to its own facts, that is, to a dispute involving clearly vested or accrued rights which arises within a reasonably short period of time after contract expiration. So confined, *Nolde Brothers, Inc.* does not apply to the instant case.

III.

At first blush, seniority status may appear to be a vested right. But it is not akin to a wage, pension benefit or other form of compensation for labor. Seniority status exists only as a creature of contract. Even if seniority status is considered to be vested or accrued, the *role* which seniority status plays in such things as promotions, transfers and layoffs is not vested or accrued.

Further, in the instant case, seniority status, standing alone, did not determine the order of layoffs. Seniority status played a role in layoffs only when "other things

such as aptitude and ability are equal." Aptitude and ability and "other things" are not vested or accrued rights. Indeed, in some jobs, they may decrease with length of service. So if *Nolde Brothers, Inc.* does apply, the dispute over the order of layoffs in the instant case did not "arise under" the expired CBA.

IV.

The *Nolde* presumption of arbitrability is adequately negated by specific language in the expired collective bargaining agreement.

ARGUMENT

The Obligation of an Employer to Bargain, Imposed by Section 8(a)(5) of the Act, and Specifically Defined by Congress in Section 8(d) of the Act, Does Not Require the Arbitration of Post-Contract Termination Disputes.

The Board's complaint alleged that petitioner "has been engaging in unfair labor practices . . . within the meaning of Sections 8(a)(1) and (5) . . . of the Act . . . ." since October 5, 1980 by refusing to process grievances over layoffs which occurred on or after August 29, 1980. J.A. 15. It is undisputed that the collective bargaining agreement in which petitioner and the union agreed to arbitrate expired on October 5, 1979, some eleven months before the layoffs. Pet. App. A4, B3. There is no complaint allegation or Board or court finding that petitioner refused to meet with the union at a reasonable time and confer in good faith with respect to wages,

hours or conditions of employment, or the negotiation of an agreement or any question arising under an agreement. There is no allegation or finding petitioner refused to execute an agreement once reached. There is no complaint allegation or Board or court finding that petitioner failed to serve a written notice on the union proposing contract termination, or that it did not notify the appropriate Federal and State mediation and conciliation services of the existence of a dispute. There is no allegation or finding that petitioner failed to continue the collective bargaining agreement in effect until the later of contract expiration or the end of the notice period required by Section 8(d) of the Act. In short, there is no allegation that petitioner ever did anything which Congress defined as an unfair labor practice under Sections 8(a)(5) and 8(d) of the Act. 29 U.S.C. §158(a) and §158(d).

It is Congress which legislates; and in Section 8(d) of the Act, Congress has very specifically and clearly stated what it meant by the obligation "to bargain collectively" when it legislated that it would be an unfair labor practice for an employer "to refuse to bargain collectively." Notwithstanding the absence of any conduct by petitioner which could arguably fall within the parameters of Section 8(a)(5) and Section 8(d) of the Act, the Board found petitioner had violated Section 8(a)(5) by engaging in a blanket refusal to arbitrate grievances which did not arise until some eleven months after contract expiration. The Board reached this conclusion by relying on its then recent holding in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). Pet. App. B7. In *Indiana & Michigan*, the Board relied on *Nolde Brothers, Inc. v. Local 358, etc.*, 430 U.S. 243. The Court below "assume[d] without deciding that the Board's *Indiana & Michigan* decision is a reasonably

defensible construction of the Section 8(a)(5) duty to bargain." Pet. App. A18.

The Board's reliance on *Nolde Brothers, Inc.* is misplaced. *Nolde Brothers, Inc.* involved a civil action under Section 301(a) of the Act, 29 U.S.C. §185(a), brought by a union in a United States District Court to compel an employer to submit a dispute to arbitration. The *Nolde* Court specifically stated that "[o]nly the issue of arbitrability is before us." 430 U.S. at 244. By no stretch of the imagination can it be said the *Nolde* Court held that it was an unfair labor practice, a violation of Section 8(a)(5) of the Act, for an employer to refuse to arbitrate a post-contract expiration dispute. Congress, in Section 301(a), specifically provided that civil suits could be brought in district courts alleging violations of collective bargaining agreements. Congress did not choose to provide that a breach of a collective bargaining agreement would also be an unfair labor practice in violation of Section 8(a)(5). The Board has no authority to legislate in an area where Congress has declined to Act. It is up to Congress to decide what shall be the appropriate avenue for addressing an alleged breach of a collective bargaining agreement. By legislating such a clear and detailed definition of the unfair labor practice of refusing to bargain, while making available civil suits for breaches of collective bargaining agreements, Congress has made a clear choice. While it may be a breach of contract to refuse to follow the arbitration clause in a collective bargaining agreement, it is not an unfair labor practice.

Nolde Brothers, Inc. Should Be Modified Or, at Least, Narrowly Confined to the Facts in That Case.

The *Nolde* Court recognized the long-standing principle of labor-management relations law that the duty to arbitrate rests upon mutual consent:

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. 430 U.S. at 250.

Indeed, in the instant case, the Board stated, "[i]n the recently decided *Indiana & Michigan Electric Co.*, 284 NLRB No. 7 (May 29, 1987), we reaffirmed our conclusion in *Hilton-Davis Chemical Co.*, 185 NLRB 241 (1970), that 'the arbitration commitment arises solely from mutual consent and that Congress did not intend the National Labor Relations Act to operate to create a statutory duty to arbitrate.'" Pet. App. B5. No one disputes the law has always been that the obligation to arbitrate a dispute is based on mutual consent. *Nolde Brothers, Inc.* runs contrary to this long-standing case law.

Various statutory pronouncements of Congress are consistent with this long-standing case law. In defining the obligation to bargain collectively, in Section 8(d) of the Act, 29 U.S.C. §158(d), Congress specifically provided, ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." Further on, in Section 8(d) of the Act, Congress requires that a party to a collective

bargaining agreement not terminate or modify it without first giving appropriate notices and continuing it in full force and effect, without strike or lockout, for the 60-day notice period "or until the expiration date of such contract," whichever occurs later. If Congress requires a party continue "all the terms and conditions of the existing contract," including the arbitration provision, "in full force and effect, without resorting to strike or lockout" until the end of the 60-days notice period "or until the expiration of such contract," whichever is later, it seems logical Congress intended terminations or modifications could be made after "the expiration date of such contract." It is clear Congress had no hesitancy in recognizing "all the terms and conditions of the existing contract," including the arbitration provision, could be terminated upon contract expiration.

In Section 13 of the Act, 29 U.S.C. §163, Congress provided that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." But an agreement to arbitrate has long been recognized as the *quid pro quo* for the obligation not to strike. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 455. It would follow, then, that under *Nolde Brothers, Inc.*, if an employer must arbitrate a grievance which arises eleven months after contract expiration, the union could not strike over the same dispute. This result runs contrary to Section 13 of the Act and most likely would shock most unions. Consequently, it seems more logical to conclude the union receives the advantages intended by Section 13 and may strike; and this being the case, the employer is under no obligation to arbitrate a post-contract expiration dispute.

In Section 201 of the Act, 29 U.S.C. §171, Congress states ". . . it is the policy of the United States that — . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for . . . voluntary arbitration . . . ." An employer compelled against its will to arbitrate a dispute arising eleven months after expiration of the arbitration agreement is not engaged in "voluntary arbitration."

In Section 203(d) of the Act, 29 U.S.C. §173(d), Congress provided:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Where, as here, the parties have agreed that the provisions of a contract, including the arbitration provision, "shall be in effect" for the term of the agreement, and that term expires, yet the Board requires the provision setting forth a method for the final adjustment of disputes must remain in effect after contract expiration, the Board has not given proper recognition to the "method agreed upon by the parties." It is also noteworthy that Congress, in Section 203(d), referred to the settlement of disputes "arising over the application or interpretation of an existing collective-bargaining agreement." Congress did not state that the final adjustment of disputes arising over the application or interpretation of an *expired* collective bargaining agreement by a method agreed upon by the parties was the desirable method.

Nolde Brothers, Inc. is out of sync with the realities of the collective bargaining process. Many contracts contain a provision stating the contract will be in effect for the term of the agreement. Virtually all agreements contain a very specific duration clause. Contracts may run for 1, 2, or 3 years. Some run for 5 years. Frequently, the duration of the agreement is one of the most hotly-negotiated items. When the parties to a collective bargaining agreement specifically state in the agreement that its provisions shall be in effect for the term of the agreement, and that the agreement shall expire on a specified date, they surely intend for those provisions to mean something. They surely do not negotiate meaningless language. *Nolde Brothers, Inc.* is backwards as far as the realities of collective bargaining are concerned. *Nolde Brothers, Inc.* runs roughshod over clear, negotiated contract language dealing with termination dates and says to the the party declining to arbitrate a post-contract dispute, "in spite of your agreement that this contract and all of its provisions terminate on October 5, 1979, if you expect that agreement on termination to apply to one clause, the arbitration clause, you have to say so." It ought to be the opposite. The party pursuing the arbitration of a post-contract termination dispute, in the face of a clear contract termination clause, should bear the burden of proving the parties intended the arbitration clause to outlive the contract.

Nolde Brothers, Inc. spawns litigation and deprives the parties of the legal certainty essential to successfully conducting their respective operations. *Nolde Brothers, Inc.* always leaves open two questions: (1) Does the dispute "arise under" the collective bargaining agreement? (2) What role does the passage of time play? For example, in the instant case, the Board, deemed to be the expert in labor matters, concluded the layoff

grievances did not "arise under" the contract. Pet. App. B16. The Court below, however, decided the layoff grievances did "arise under" the contract. Pet. App. A22. In reaching that conclusion, the Court below noted, "[t]he Board and the courts have had considerable difficulty trying to develop a coherent set of principles for determining when a grievance 'arises under' the [collective bargaining agreement]." Pet. App. A19. The Court below then goes on to point out that "[s]ince the Board handed down its Decision and Order in the instant case, it has decided at least two other cases that conflict with its 'arising under' conclusion in the instant case." Pet. App. A19. Next, the Court below points out that the Board's "arising under" standard conflicts with the Court's own standard, which centers "its analysis on 'preserving the original intent of the parties' as to whether a particular type of grievance would have been arbitrable if circumstances unanticipated by the parties when the agreement was drafted had not arisen." Pet. App. A20-A21. The Court below characterized its approach as one where "we construed much more expansively the *Nolde* presumption of arbitrability of post-expiration grievances; rather than focusing on a narrow concept such as 'accrual' . . . ." Pet. App. A21. Meanwhile, the Court of Appeals for the Tenth Circuit has recently held that grievances based on seniority do not arise under an expired collective bargaining agreement. *United Food & Commercial Workers Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). The role played by the passage of time between contract expiration and grievance events also provides a fruitful plain for litigation battles. The Court below rejected petitioner's contention there was no obligation to arbitrate post-expiration grievances because of the passage of time between contract expiration and grievance event. Pet. App. A16, n. 8. But other

Courts of Appeals have held that the passage of time does affect the applicability of the *Nolde* presumption. *Local 703, Int'l Bro. of Teamsters v. Kennecott Bros. Co.*, 771 F.2d 300 (7th Cir. 1985); *Chauffeurs, Teamsters and Helpers Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir. 1986); *The O'Connor Company, Inc. v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983).

The reasons relied upon in *Nolde Brothers, Inc.* in support of the conclusion that post-contract termination grievances are arbitrable are suspect. The *Nolde* Court expressed concern that adherence to the "arbiration is based on mutual consent" rule would logically preclude post-contract arbitration even when the grievance facts arose during the contract term. 430 U.S. at 251. But no one in the *Nolde* case took that position, as the Court itself noted. 430 U.S. at 251. To argue a result might occur, which "could not seriously be contended" would occur, should arbitration not be ordered, seems to be a weak argument. 430 U.S. at 251. The *Nolde* Court next attached significance to the holding in *John Wiley & Sons v. Livingston*, 376 U.S. 543. But *John Wiley* was a case where the grievance facts occurred while the collective bargaining agreement was still in effect, which the *Nolde* Court acknowledged. 430 U.S. at 252. The most important fact which could distinguish one case from another would be that in one case the grievance facts took place before contract expiration, while in the second case those facts occurred after contract termination. Relying on a case so readily distinguishable does not seem to be persuasive. Next, the *Nolde* Court argued the parties did not include language expressly excluding from arbitration those disputes arising after contract termination. The *Nolde* Court reasoned that in the absence of such language, there were strong reasons to

conclude the parties did not intend the arbitration obligation to end with the term of the agreement. 430 U.S. at 252-253. But it could just as easily be said that because the parties did not expressly provide for the arbitration of post-contract termination disputes, they did not intend to arbitrate such disputes. The *Nolde* Court's contention is no more compelling than the contrary argument. In reality, the likely reason the parties in *Nolde* did not expressly provide for post-contract termination arbitration is because they never dreamed such language was required. Most likely, they believed the rather detailed contract termination language which they did agree to was sufficient. 430 U.S. at 246. In 1966, the U. S. Department of Labor surveyed "virtually all agreements in the United States covering 1,000 workers or more," excluding railroad, airline and government agreements. Not one agreement contains language expressly negating the obligation to arbitrate post-contract termination grievances. It is doubtful that virtually every such employer in the United States with a collective bargaining agreement containing an arbitration clause intended the clause to outlive the agreement. What is more likely is no one thought such express language was necessary. *Major Collective Bargaining Agreements, Arbitration Procedures*, Bulletin No. 1425-6, United States Department of Labor (1966). The *Nolde* Court next argued the parties clearly expressed their preference for an arbitral, rather than a judicial interpretation of the collective bargaining agreement because " '[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . .' " 430 U.S. at 253. Actually, in most cases, a panel of arbitrators is furnished to the parties by either the American Arbitration Association or the

Federal Mediation and Conciliation Service, together with considerable biographical information regarding each member of a panel. *Major Collective Bargaining Agreements, Arbitration Procedure,* Bulletin No. 1425-6, United States Department of Labor (1966), p. 36-37. The parties then seek to find out how the arbitrators on the panel have ruled on other cases, and whether any arbitrator has ruled for or against any party in the past. Those who appear to lean against the union are struck from the panel by the union; those leaning against the employer are struck by the employer. AAA or FMCS then appoints an arbitrator from those left on the panel. So it is very rare that the parties chose an arbitrator because of their confidence and trust in him or her. In reality, each party is trying to obtain an arbitrator who will be favorable to its side.

The *Nolde* Court's final argument was that national policy favors arbitration and the parties "must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration." 430 U.S. at 255. But it is also national policy that the parties, and not the government, determine what goes into a collective bargaining agreement. It is national policy that the law does not compel either employer or union to agree to any proposal or require the making of a concession. *Nolde Brothers, Inc.* requires an employer to either (1) submit to post-contract termination arbitration when it may not wish to do so, or (2) attempt to obtain the union's agreement that disputes based on facts occurring after contract termination are not arbitrable. The response of most unions to such a request would be a demand for something in return. In other words, a concession would have to be made by the employer on, most likely, some other issue all because of government intervention. True, there is a national

policy favoring arbitration, but it is arbitration by mutual consent, in accordance with the long-standing precedent that the arbitration duty is a matter of mutual consent. 430 U.S. at 250-251. There is also a national policy protecting the right to strike, probably the most guarded right unions possess. But, if an employer must arbitrate grievances arising months after contract termination, does not the union lose its right to strike over such grievances? There is also a national policy favoring "voluntary" arbitration and that the "method agreed upon by the parties" for settling disputes arising under collective bargaining agreements is the "desirable method." 29 U.S.C. §171, §173(d). A party compelled by court order to arbitrate a post-contract termination dispute is not engaged in "voluntary" arbitration. A party arbitrating a post-contract termination dispute under court order is not utlizing a "method agreed upon by the parties."

For the foregoing reasons, *Nolde Brothers, Inc.* should be modified as follows:

1. There is no obligation to arbitrate grievances based on facts which occur subsequent to contract termination, except as follows: grievances involving contract entitlements generally regarded as compensation for services already rendered are arbitrable, including such entitlements as wages, pension benefits, severance pay, sick leave pay and vacation pay. These items are almost always carried "on the books" of an employer and are viewed as a form of deferred compensation for services rendered over a period of time.

2. Grievances based on facts occurring prior to contract expiration are arbitrable, even though the grievance is filed after such expiration.

3. Any party seeking to arbitrate any other post-contract expiration grievance must prove, by clear and convincing evidence, that the parties intended to continue the arbitration provision in effect after contract termination.

These modifications will leave us with a scheme which keeps faith with the principle that arbitration is based on mutual assent and is consistent with our national policy that the parties to a collective bargaining agreement — and not the government — should determine what goes into it. This scheme will accurately reflect what the parties believe they are negotiating when they negotiate termination clauses. It will protect the unions' right to strike, provide legal certainty and substantially reduce litigation over the "arising under" standard and the role of the passage of time. In short, it will work. *Nolde Brothers, Inc.* has not.

At the very least, *Noldè Brothers, Inc.* should be narrowly confined to its own facts, being applicable only to disputes over rights which are clearly accrued or vested and to cases where the grievance facts occur shortly after contract expiration. The *Nolde* Court expressly pointed out the union's contention "that the severance wages provided for in the collective bargaining agreement were in the nature of 'accrued' or 'vested' rights, earned by employees during the term of the contract on essentially the same basis as vacation pay, but payable only upon termination of employment." 340 U.S. at 248. The *Nolde* Court accepted that contention:

> The fact that the amount of severance pay to which an employee is entitled under the collective bargaining agreement varies according to the length of his employment and the amount of his salary also supports the Union's position that severance pay was nothing more than deferred compensation. 340 U.S. at 248, n. 4.

The *Nolde* Court, itself, appeared to have limited its holding to cases where, as in *Nolde,* the grievance fact occurred shortly after contract expiration:

> ". . . we need not speculate as to the arbitrability of post-termination contractual claims which, unlike the one presently before us, are not asserted within a reasonable time after the contract's expiration." 340 U.S. at 255, n. 8.

The right to layoffs based on other things such as aptitude and ability, and seniority only where other things such as aptitude and ability are equal, is not an accrued or vested right. It is not deferred compensation. There is a vast difference between the 4 days' passage of time in *Nolde* and the more than eleven months' passage of time in the case presently before the Court. Confined to its intended limits, *Nolde* provides no basis for the Board's finding petitioner violated Section 8(a)(5) of the Act.

The Grievances in the Instant Case Did Not "Arise Under" the Expired Collective Bargaining Agreement.

It seems almost sacrilegious to say seniority status is not an accrued or vested right. Nevertheless, some cases so hold. *United Food & Commercial Workers International Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990). What is clear is that the *role* which seniority status plays in a collective bargaining agreement is not an accrued or vested right. Seniority may be carried on an employer's books in the form of a "seniority list," but the role which that seniority will play in such things as layoffs, promotions, transfers, shift assignments, overtime assignments, and the assignment of vacation time is not an accrued or vested right. Provisions on layoffs, promotions, transfers, shift assignments, overtime assignments and assignment of vacation times are frequently modified to change the role played by seniority in those areas. If the role of seniority is "vested," however, those provisions could not be changed and the process of collective bargaining would be seriously stifled. In any event, in the instant case, petitioner did not take away the *seniority* of any employee. At the very most, petitioner could be accused of changing the *role* played by seniority under the expired collective bargaining agreement (which petitioner does not concede it did). This being the case, the union's grievance in the instant case did not "arise under" the expired agreement. Thus, even if the *Nolde Brothers, Inc.* and *Indiana & Michigan* "arise under" standard prevails, the dispute here did not "arise under" the expired contract.

Moreover, in the instant case, the expired collective bargaining agreement did not provide that layoffs would

be made on the basis of strict seniority. Rather, the parties agreed that "in case of layoffs, lengths of continuous service will be the determining factor if *other things such as aptitude and ability are equal.*" (Emphasis added.) J.A. 30. There are many "other things" which an employer might reasonably consider in determining the order of layoff: skill, experience, physical fitness, previous training, previous service on the job, knowledge, general performance, attendance, adaptability to do other work in the plant, future potential, education and quality of work. A small number of agreements also call for the consideration of family status, number of dependents and place of residence. *Major Collective Bargaining Agreements, Layoff, Recall and Worksharing Procedures,* Bulletin 1425-3, U.S. Department of Labor (1972), p. 33-35. Add the "aptitude and ability," specifically spelled out in the expired agreement, to the "other things" suggested above, and it is clear the layoff provision in the collective bargaining agreement conferred no "vested" right on employees. Aptitude, ability and many of the "other things" vary from day to day and may actually decrease as length of service increases and cannot be accrued. Consequently, even under the *Nolde Brothers, Inc.* and *Indiana & Michigan* "arises under" standard, the grievances filed by the union over the layoffs did not "arise under" the expired contract and are not arbitrable.

In its opinion, the Court below reversed the Board's finding that the grievances did not "arise under" the expired agreement, concluding, "[s]ince the Board handed down the Decision and Order in the instant case, it has decided at least two other cases that conflict with its 'arising under' conclusion in the instant case." Pet. App. A19. The Court below cited *United Chrome Products, Inc.*, 288 NLRB 1176 (1988), and *UPPCO,*

Inc., 288 NLRB 937 (1988). Pet. App. A20. The Court below also concluded the Board had failed to explain why the consideration of aptitude and ability prevent arbitrability. Pet. App. A20, n. 9. In its Decision and Order, however, the Board, in declining to order arbitration, did explain, "[t]he right to lay off by seniority if other factors such as ability and experience are equal is not 'a right worked for or accumulated over time.' *Indiana & Michigan, supra,* slip. op. at 23." Pet. App. B16. Further, in *United Chrome Products, Inc., supra,* the Board specifically distinguished its decision and order in the instant case by explaining that consideration of aptitude and ability preclude arbitration because aptitude and ability do not "arise under" a contract. 288 NLRB at 1177. The contention of the Court below that the Board had not "explain[ed] why consideration of 'aptitude and ability' prevent arbitrability" (Pet. App. A20, n. 9) is ill-founded. The Court below also relied upon *Local Jt. Exec. Bd. of Las Vegas Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied,* 479 U.S. 1033 (1987), *George Day Construction Co. v. United Bhd. of Carpenters and Joiners of America, Local 354*, 722 F.2d 1471 (9th Cir. 1984) and *O'Connor v. Carpenters Local Union No. 1408*, 702 F.2d 824 (9th Cir. 1983). *George Day* is not applicable, because there the employer *submitted* the arbitrability question to the arbitrator, lost the case, then sought to argue the grievance was not arbitrable. The Court specifically held that "By consenting to the arbitrator's consideration of the arbitrability question, the parties bound themselves to his decision." 722 F.2d at 1479. In *Royal Center,* the collective bargaining agreement had in fact never expired even though, in dicta, the Court said that fact made no difference in its decision. The case also turned upon a specific contractual clause obligating Royal Center to

obligate any purchaser of its business to assume its collective bargaining agreement. The Court reasoned the parties must have intended such an agreement to survive any contract termination which might occur automatically as the result of a sale of the business; otherwise, the clause would be meaningless. 796 F.2d at 1163. In *O'Connor,* the Court stated:

> The Union contends that even though the collective bargaining agreement had terminated, the obligation to arbitrate continued, even as to matters occurring after termination of the agreement.
>
> . . . .
>
> The question now before the Court is whether the Company in this case had a continuing obligation to arbitrate grievances which arose after the expiration of the collective bargaining agreement. This question must be answered in the negative.
>
> . . . .
>
> The Union's position in this case is untenable because the labor dispute involved here arose following termination of the old contract and was not covered by that contract. 702 F.2d at 825.

In *O'Connor,* the court specifically noted the contract expired June 15, 1980 and the grievance concerned a complaint arising on March 31, 1981. 702 F.2d at 825. Obviously, time passed between those two dates and the grievance could not "be covered by that contract" because "that contract" no longer was in existence.

Specific Contract Language Adequately Negates the *Nolde* Presumption.

Even under *Nolde Brothers, Inc.*, the presumption favoring arbitrability may be "negated expressly or by clear implication." 430 U.S. at 255. Here, the expired agreement:

1. Started out by stating, "the stipulations set forth below shall be in effect for the time hereinafter specified (which turned out to be October 5, 1979)." Surely the parties meant something when *they agreed to this language*. J.A. 22.
2. Included a duration or termination clause. Surely the parties meant something when *they agreed that the contract would terminate on a certain date*. J.A. 44, 53.
3. Included a specific no-strike clause providing there would be no strike "during the term of this agreement." Thus, there was no *quid pro quo* for an arbitration obligation when the no-strike clause expressly expired after the term of the agreement. Surely the parties never intended that the union could strike, but petitioner had to arbitrate, over post-contract termination disputes. J.A. 34.
4. Contained an "interest arbitration" provision, *i.e.*, one providing that, if the parties could not agree upon a

successor agreement to the one which was due to expire on October 5, 1979, they would submit any unresolved issues to an arbitrator. Thus, the parties *knew* how to write a clause providing for the arbitration of issues outside the normal arbitration clause, but did not do so with respect to contract disputes which might arise after contract termination. This justifies an inference the parties had no intention that the normal arbitration clause would outlive the term of the agreement. J.A. 53-55, Tr. 9, 10.

CONCLUSION

The refusal to arbitrate a dispute which arises months after the expiration of the collective bargaining agreement containing the arbitration obligation simply does not fall within the very specific definition of refusing to bargain set forth in Section 8(d) adopted by Congress. To put it bluntly, the Board has legislated its own version of an unfair labor practice. Petitioner requests the Court to reverse the finding of the Court below that petitioner violated Section 8(a)(5) of the Act.

Should the Court find it necessary or appropriate to analyze or discuss *Nolde Brothers, Inc.*, petitioner requests the Court to modify its holding, as suggested earlier in this brief at pages 23-24, thereby providing employers and unions with a workable rule which will be consistent with (1) the concept that arbitration is based on mutual consent, (2) the national policy that the parties should determine what goes into a collective bargain- ing agreement — not the government, (3) the

national policies favoring voluntary arbitration and the right to strike, (4) the realities of collective bargaining and, lastly, such a rule will result in less litigation. Petitioner requests the Court to reverse the Section 8(a)(5) finding of the Court below upon a re-examination of *Nolde Brothers, Inc.*

If *Nolde Brothers, Inc.* stands as is, petitioner requests the Court to reverse the Section 8(a)(5) finding of the Court below. First, the layoff clause, based on several factors which are not accrued or vested, conferred no rights on employees of a vested nature. Thus, the dispute which the union sought to arbitrate did not "arise under" the expired contract. The Board was correct in this regard, and the Court is requested to defer to its expertise. It is a fair assumption that the Board possesses more expertise in labor relations matters than the Court below. Lastly, the passage of eleven months makes the *Nolde* presumption of doubtful validity.

Second, by clear implication, the parties never intended the arbitration provision to outlive the collective bargaining agreement.

Respectfully submitted,

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